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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding
800 MHz SMR

PR Docket No. 93-144
RM-8117, RM-8030,
RM-8029

PP Docket No. 93-253

To: The Commission

REPLY COMMENTS OF CELLCALL, INC.

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March 1, 1995

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SUMMARY

CellCall, Inc. ("CellCall") hereby submits its Reply to the Comments filed in response to the Further Notice of Proposed Rule Making regarding the adoption of rules governing wide-area 800 MHz specialized mobile radio service.

CellCall addresses its Reply Comments primarily to the issue of whether incumbent licensees should be relocated from the 200-channel contiguous SMR spectrum to other frequencies to make room for wide-area licensees. Based on its review of the record in this proceeding and its participation in discussions with SMR operators and industry representatives, CellCall continues to believe that relocation should be voluntary.

Only Nextel and its affiliated companies have argued in support of mandatory relocation. Their arguments are not sufficient to compel a change in the Commission's determination in the Further NPRM that voluntary relocation best serves the public interest. The principle of regulatory parity for CMRS, while supporting the authorization of SMR service on a geographic basis, does not provide a basis for mandating relocation of incumbents in order to obtain contiguous spectrum; rather, it supports making available the opportunity to obtain contiguous spectrum, and incenting the wide-area licensee to deal fairly with incumbents to obtain contiguous spectrum if the wide-area licensee has a compelling need for it. Consequently, the Commission should adopt wide-area SMR licensing rules that are based on voluntary relocation principles, as set forth herein.

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	
Amendment of Part 90 of the)	PR Docket No. 93-144
Commission's Rules to Facilitate)	RM-8117, RM-8030,
Future Development of SMR Systems)	RM-8029
in the 800 MHz Frequency Band)	
)	
and)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act -)	
Competitive Bidding)	
800 MHz SMR)	

To: The Commission

REPLY COMMENTS OF CELLCALL, INC.

CellCall, Inc. ("CellCall"), by its attorneys, and pursuant to the Commission's Order, DA 94-1326, released January 18, 1995, hereby submits its reply comments in response to the Further Notice of Proposed Rule Making, FCC 94-271, released November 4, 1994 (the "Further NPRM") in the above-captioned proceeding. The following is respectfully shown.

I. Introduction

1. The Further NPRM generated substantial attention and comment from all segments of the Specialized Mobile Radio

("SMR") industry, including equipment manufacturers,^{1/} associations representing various SMR industry interests^{2/} and the interests of other industries,^{3/} government agencies,^{4/} operators of competing commercial mobile radio services,^{5/} operators of private SMR systems,^{6/} local SMR operators and radio

^{1/} See Comments of Motorola, Inc.; E.F. Johnson Company; Ericsson Corporation.

^{2/} See Comments of American Mobile Telecommunications Association ("AMTA"); Council of Independent Communications Suppliers; Industrial Telecommunications Association, Inc. and the Alliance of Private 800/900 MHz Licensees; Personal Communications Industry Association; SMR Small Business Coalition; SMR Won.

^{3/} See Comments of American Petroleum Institute; Association of Public-Safety Communications Officials-International, Inc.; Cellular Telecommunications Industry Association; National Telephone Cooperative Association; Organization for the Protection and Advancement of Small Telephone Companies; and UTC, The Telecommunications Association.

^{4/} Comments of the Chief Counsel for Advocacy of the United States Small Business Administration.

^{5/} See Comments of Atlantic Cellular Company L.P.; McCaw Cellular Communications; Vanguard Cellular Systems, Inc.

^{6/} See Comments of Anheuser-Busch Companies, Inc.; United States Sugar Corporation.

dealers,^{7/} regional SMR operators and managers,^{8/} and the single largest SMR operator and its affiliated companies.^{9/}

2. Because it would be impossible to respond to all of the individual comments filed in response to the Further NPRM, CellCall's reply comments are directed primarily to the most contentious issue that divides those, such as CellCall, who

^{7/} See Comments of American Industrial and Marine Electronics, Inc.; Applied Technology Group, Inc.; Douglas L. Bradley and Dennis Hulford; Brandon Communications, Inc.; Don Clark Radio Communications, Inc.; Communications Center, Inc.; Communications Unlimited, Inc.; Courtesy Communications; Cumulous Communications Corp.; Fresno Mobile Radio, Inc.; Genesee Business Radio Systems, Inc.; Gulf Coast Radiofone; Dru Jenkinson, Inc., Jana Green, Inc., and Shelly Curttright, Inc.; Lagorio Communications; Kevin Lausman d/b/a/ Communications Service Center; Thomas Luczak; Russ Miller Rental; Nashtel, L.L.C.; Parkinson Electronics Co. et al.; Pierre Radio Paging & Telephone, Inc.; Pro Tec Mobile Communications, Inc.; Supreme Radio Communications, Inc.; T&K Communications Systems, Inc.; Total Com, Inc.; Wiztronics, Inc.; Automated Business Communications; B & C Communications; Bis-Man Mobile Phone, Inc.; Bolin Communication Systems; Dakota Electronics; Diamond "L" Industries, Inc.; E.T. Communications Co.; Keller Communications, Inc.; Nielson Communications, Inc.; NODAK Communications; Radio Communications Center; Raserco, Inc.; Rayfield Communications, Inc.; Southern Minnesota Communications, Inc.; Vantek Communications, Inc.; A.B. Carver; Marc Sobel d/b/a Airwave Communications; Eden Communications, Inc.; Joriga Electronics, Inc.; James A. Kay; Madera Radio Dispatch, Inc.; Robert Fetterman; C.T. Spruill; Rod Stulvey; Triangle Communications.

^{8/} See Comments of American SMR Company L.C.; Atlantic Cellular Co. L.P.; CellCall, Inc.; Centennial Telecommunications, Inc.; Chadmoore Communications, Inc.; Dial Call Communications, Inc.; DCL Associates, Inc.; Fisher Communications, Inc.; Morris Communications, Inc.; Pittencrieff Communications, Inc.; The Southern Company.

^{9/} See Comments of Nextel Communications, Inc. ("Nextel"); Advanced MobileComm, Inc.; Dial Call Communications, Inc.; Motorola, Inc.; OneComm Corporation; Spectrum Resources, Inc. (collectively, the "Nextel Group").

generally support the proposals contained in the Further NPRM, and those who oppose them: whether incumbent 800 MHz SMR licensees should be relocated on a voluntary or a mandatory basis to accommodate wide-area licensees who will be authorized to operate on spectrum that already has been licensed to the incumbents.

3. Relocation of 800 MHz SMR licensees now has been the subject of voluminous comment in two separate proceedings. In its Comments in GN Docket No. 93-252, Regulatory Treatment of Mobile Services, Nextel proposed a scheme for licensing 800 MHz SMR service on a wide-area basis that included the mandatory relocation of incumbent licensees. The record from that proceeding reflected widespread opposition to mandatory relocation, and the proposal was not adopted.^{10/} Despite attempts in the interim to achieve industry consensus on this issue, the comments in response to the Further NPRM indicate that neither the breadth nor the depth of the opposition has been altered. In fact, the only comments in favor of mandatory relocation were submitted by the Nextel Group. In CellCall's view, the Commission should consider Nextel's inability to muster any support from non-affiliated small, medium, or large SMR operators as a clear indication that Nextel's proposed mandatory relocation plan would serve the private business interests of

^{10/} See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order, 9 FCC Rcd. _____ (1994) (citing Reply Comments filed July 11, 1994, in GN Docket No. 93-252).

Nextel, but not the public interest, which must look to the industry as a whole.

4. Since comments were filed in early January, CellCall has participated in discussions with other SMR operators and with industry associations in an effort to determine if consensus could be reached on the relocation issue. Despite the Commission's statement in the Further NPRM that it does not favor mandatory relocation and the overwhelming opposition in the comments to mandatory relocation, these discussions generally have focused on what incentives should be implemented to induce incumbents to relocate on a mandatory basis. This emphasis is misplaced. Instead, the rules governing wide-area 800 MHz SMR should be based on a principle of voluntary relocation.

5. CellCall believes a substantial record supports the Commission's tentative conclusion in the Further NPRM that relocation of incumbent upper band 800 MHz SMR licensees should be voluntary.^{11/} Therefore, because all interested SMR industry parties are unlikely to agree on all of the proposals set forth in the Further NPRM, and are particularly unlikely to unite on the relocation issue, the Commission should promptly adopt wide-area SMR licensing rules that provide a workable voluntary transition plan. To this end, CellCall's specific proposal for relocation of incumbent licensees is set out in greater detail below.

^{11/} 800 MHz Further NPRM at paras. 33, 34-35.

**II. The Adoption of Wide-Area 800 MHz SMR
Licensing Will Further the Goal of
Regularity Parity for CMRS**

6. Numerous commenters oppose entirely the Commission's proposal to license 800 MHz SMR spectrum on a wide-area basis,^{12/} regardless of whether the specific service area designation is Major Trading Areas ("MTA"), Basic Trading Areas ("BTA") or other defined areas.^{13/} For example, Applied Technology argues there is no evidence that wide-area SMR systems "will even be technically feasible," and attacks the premise that wide-area SMR can compete with other CMRS.^{14/} Chadmoore states that the wide-area licensing proposal is anti-competitive because it "fails to enable [entities other than Nextel] to compete in the new regulatory framework."^{15/}

^{12/} To the extent the positions of the commenters who oppose all aspects of the Further NPRM are colored by their opposition to mandatory relocation of existing licensees (see, e.g., Comments of Communications Unlimited at 4; Comments of Fisher at 2), it must be stressed that the Further NPRM did not propose mandatory relocation, but merely sought comment on its feasibility. The issues of the appropriateness and viability of geographic-based licensing of SMR systems and access to contiguous spectrum are severable.

^{13/} See, e.g., Comments of A. B. Carver, Marc Sobel, Eden Communications, Joriga Electronics, James A. Kay, Madera Radio Dispatch, Robert Fetterman, C. T. Spruill, Rod Stulvey, Triangle Communications; Applied Technology Group at 2; Chadmoore at 5; Communications Unlimited at 1; Fisher at 2; Fresno Mobile Radio at 4; Lagorio at 9; Luczak at 1; Pro Tec at 6; SMR Small Business Coalition at 2; Supreme Radio at 4.

^{14/} Comments of Applied Technology Group at 2-5.

^{15/} Comments of Chadmoore at 7-8.

7. Chadmoore and Applied Technology ignore the fact that entities other than Nextel have requested or been granted wide-area authority under existing rules and policies, and likely will seek wide-area licenses under the rules adopted in this proceeding, in order to serve the growing market for mobile communications services. Moreover, these commenters misinterpret the purpose of the Commission's proposal to authorize wide-area SMR licensing. As Nextel's comments make clear, certain proposals contained in the Further NPRM -- including the authorization of SMR service on a wide-area basis -- are the result of Congressional action directing the Commission to regulate in a like manner mobile services that are similar,^{16/} and to amend its rules

as may be necessary and practical to assure that licensees [that formerly were regulated as private carriers and now are regulated as common carriers] are subjected to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services.^{17/}

The Commission already has concluded that wide-area SMR service is "substantially similar" to common carrier cellular service, and that therefore the two services should be subject to similar technical, operational, and licensing rules.^{18/} Consequently, authorizing wide-area SMR service furthers the Commission's

^{16/} See H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 259 (1993).

^{17/} 47 U.S.C. § 332(c).

^{18/} Regulatory Treatment Third Order at paras. 74, 78.

intent to make the SMR rules "to the fullest extent possible, comparable to our rules governing competing commercial mobile radio services providers."^{19/} In sum, the record established in response to the original 800 MHz NPRM, the Regulatory Treatment NPRM, and now the Further NPRM, clearly establishes the need for access to spectrum across a substantial geographic area^{20/} to enable SMR licensees to implement advanced technologies and compete with other commercial mobile radio services.

**III. The Implementation of a Wide-Area Scheme
in Furtherance of Regulatory Parity
Does Not Mandate Relocation of Incumbent Licensees**

8. Although market-based licensing is a necessary component of a wide-area SMR licensing scheme that furthers competition among all CMRS providers, CellCall disagrees with Nextel's assertion that the 1993 amendments to the Communications Act also mandate that wide-area licensees receive contiguous spectrum.

9. According to Nextel,
the Commission's statutory mandate to promote the use of more efficient wireless technologies, and to create regulatory symmetry among competing CMRS providers, requires that wide-area licensees have

^{19/} Further NPRM at para. 2.

^{20/} CellCall continues to favor licensing wide-area SMR systems on an MTA basis, which would be comparable to the service areas established for competing cellular and broadband PCS systems, and thus is consistent with the Commission's statutory obligation to craft similar rules for similar services. CellCall does not oppose, however, the use of BEAs as proposed by several commenters.

recourse to mandatory retuning where needed
to obtain the exclusive-use, contiguous
spectrum....^{21/}

Nextel's argument is flawed. Regulatory parity does not require the Commission to impose relocation of incumbent licensees from the spectrum designated for wide-area 800 MHz SMR licenses in order to obtain contiguous spectrum. Although the Commission has an obligation to promote technology that uses spectrum efficiently, adoption of Nextel's proposal would compel the Commission to adopt, in the guise of regulatory parity, rules that arbitrarily favor a particular competitor at the expense of other competitors who are competing or intend to compete aggressively in the CMRS marketplace.

10. In sum, Nextel has not shown a compelling need for contiguous spectrum that justifies mandatory relocation of incumbents. Nextel has not demonstrated that wide-area licensees and incumbent licensees cannot coexist on upper band channels, or that if they cannot coexist, that they cannot reach voluntary arrangements regarding the use of the spectrum. Several commenters note that not all SMR technology requires relocation and that 200 contiguous channels may not be necessary to offer wide-area service.^{22/} Indeed, Nextel's vigorous advocacy of the need for 200 contiguous channels is seriously impeached by its own many prior statements touting Motorola's frequency-hopping

^{21/} Comments of Nextel at 9.

^{22/} See, e.g., Comments of E. F. Johnson at 10; Pittencrieff at 11; The Southern Company at 6.

MIRS technology as a viable efficient wireless medium. In the context of an existing service where the allocated spectrum already is nearly entirely licensed, regulatory parity requires only that there be an opportunity to achieve the contiguous spectrum necessary to compete with other CMRS providers. The Commission's proposal that the terms of relocation be freely negotiated between the wide-area licensees and incumbent licensees provides this opportunity.^{23/}

**IV. Relocation Should Be Voluntary
Until the Wide-Area Licensee "Earns"
the Right to Relocate Holdouts**

11. CellCall continues to believe that voluntary relocation of incumbent licensees provides the most flexible, efficient, and equitable means to achieve contiguous spectrum and to promote the use of efficient wireless technologies.^{24/}

^{23/} CellCall favors licensing two 100-channel block wide-area licenses for each geographic area, rather than four 50-channel blocks as proposed by the Commission. See Comments of CellCall at 12. Licensing larger blocks will reduce the burden on the wide-area licensee of relocating incumbents in order to introduce more spectrum efficient technologies.

^{24/} According to Nextel, "[t]he right to negotiate with another entity ... is one which will not lead to the establishment of contiguous MTA licensee spectrum." Comments of Nextel at 31. This complaint rings hollow. Nextel has achieved its present level of channel concentration because of its success in negotiating to acquire 800 MHz SMR channels. In this regard, Nextel overstates the problem of the "last holdout." According to Nextel, mandatory relocation is required because certain incumbent licensees will not relocate under any circumstances, and therefore will serve to "foreclose certain technologies." Comments of Nextel at 23-24, n.55. However, Nextel concedes that only 72

(continued...)

However, CellCall does not oppose the concept that a wide-area licensee may "earn" the right to mandate relocation by acquiring -- through purchase, affiliation, or voluntary retuning arrangements -- a specified percentage of the channels in the geographic area. Industry discussions have yielded suggestions that the target figure be 50, 60, or 70 percent. All of these are too low. As the record in this proceeding makes clear, based on a 70% figure Nextel would have the immediate right to mandate relocation of incumbents in many markets, particularly if smaller BEAs are used. For example, Nextel states that it controls 67.5% of the channels within 100 miles of the core area of Chicago and 87% of the channels within 100 miles of the core area of Denver.^{24/} Thus, if for example a 70% benchmark is adopted, Nextel would need to acquire only a handful of channels in Chicago, and none in Denver -- hardly enough to be deemed to have "earned" the right to mandate relocation. There can be no justification for granting what would effectively be an immediate right to relocate incumbents.

12. CellCall believes the right to mandate relocation should not be considered "earned" until the wide-area licensee has acquired, through purchase, affiliation, or voluntary retuning arrangements, 90% of the channels in a "core area" of

^{24/} (...continued)

contiguous SMR channels are necessary to implement CDMA technology. Id. at 42 & n.90.

^{25/} Comments of Nextel at 38-39.

the market^{26/} that were constructed as of August 9, 1994. A 90% threshold will guarantee that the wide-area licensee is adopting a fair and reasonable relocation policy for incumbents. At the same time, mandatory relocation rights as to the final 10% will protect the wide-area licensee from having to pay "greenmail" to a small number of unreasonable holdouts.

13. Moreover, there should be no step-down of the specified percentage of channels over time. Under the Commission's construction proposals, a wide-area licensee will have a substantial period of time -- up to three years -- before it must reach the first construction benchmark.^{27/} Thus, for example, if the percentage of channels required to mandate relocation decreases to 65% after two years and 50% after three years, a wide-area licensee who must construct 50% of the channels in its service area by the third year of the license term would have "earned" the right to relocate incumbents, and would have little incentive to negotiate with incumbents early in the license term. A wide-area licensee that already has the specified percentage, such as Nextel, would have no incentive.

14. Once the wide-area licensee reaches the 90% benchmark, a one-year period would begin during which the wide-area licensee and the remaining incumbent licensee(s) would negotiate the terms of relocation on a voluntary basis. If

^{26/} If MTAs or BEAs are adopted as the defined service area, the core area should be defined as a 25-mile radius around the center point of the MTA or BEA.

^{27/} Further NPRM at para. 48.

negotiations have not been successful after one year, the wide-area licensee would have the right to relocate the incumbent, and would be required to offer fully comparable channels in the 800 MHz band at existing or acceptable alternative sites, to pay all costs associated with the relocation, and to demonstrate that the relocated licensee will have 70-mile co-channel interference protection on the new channels.

15. A voluntary relocation program also relieves the Commission of having to micromanage the relocation process, which it will have to do if wide-scale mandatory relocation is adopted. For example, an incumbent SMR operator will naturally be unwilling to provide its customer list to the wide-area licensee. So, the burden and costs associated with contacting subscribers whose units must be retuned will fall on the incumbent. Who pays for this? What is the incumbent's time and effort worth? What if a customer is lost due to the inconvenience of the change-out? The Commission will be forced to get involved in all of this minutiae if it subjects incumbents to mandatory relocation.

16. Given its significant channel positions in Denver, Chicago, and many other major markets,^{28/} it is unlikely that

^{28/} According to the Complaint for Judgment and Injunctive Relief filed by the Department of Justice against Nextel and Motorola, Civil Action No. 1:94CV02331, at 9-14, following completion of its proposed transactions with Dial Call and Motorola, Nextel will control the following number of trunked 800 MHz SMR channels in the top 15 metropolitan areas of the United States: 300 channels in Atlanta, 230 channels in Boston, 265 channels in Dallas, 160 channels in Detroit, 271 channels in Houston, 164 channels in Los Angeles, 313 channels in Miami, 196 channels in New York, (continued...)

Nextel will face competing applications for the wide-area licenses for these markets.^{29/} Mandatory relocation would further depress competition.^{30/} For mandatory relocation to work, the wide-area licensee must itself either be licensed for the spectrum that will be used to relocate incumbents, or be prepared to purchase the channels. Nextel is the only entity with sufficient 800 MHz spectrum outside the 200 upper band SMR channels to relocate a significant number of incumbents.^{31/} Consequently, the number of potential applicants for wide-area licenses would be reduced because of the limited amount of available relocation spectrum. Furthermore, because Nextel also controls a significant number of lower band SMR channels, it is unlikely that a prospective applicant could purchase these channels; Nextel itself will need them for relocation purposes.

^{28/} (...continued)

313 channels in Orlando, 207 channels in Philadelphia, 254 channels in San Francisco, 189 channels in Seattle, and 200 channels in Washington, D.C. See Comments of SMR Won, Exhibit G. See also Comments of The Southern Company, Exhibits A-P, regarding Nextel channel holdings in the southeast United States.

^{29/} The Commission's recent Order approving the transfer of OneComm Corporation, N.A. and C-Call Corp. to Nextel noted that "[i]f the Dial Call and Motorola transactions are also approved and consummated, Nextel will control more 800 MHz SMR channels in the United States than any other single company." Order, DA 95-263, released February 17, 1995, at para. 23.

^{30/} See Comments of Atlantic Cellular.

^{31/} According to Nextel, in Denver and Chicago it can retune all non-Nextel incumbents to lower band channels it already controls. See Comments of Nextel at 38-39. See also Comments of SMR Won at 45.

17. CellCall notes that if relocation is conducted on a voluntary basis, many of the arguments against the wide-area SMR licensing proposals set forth in the Further NPRM fail. For example, several commenters state there is insufficient spectrum available for relocating incumbents.^{32/} If this is the case, then the incumbent simply will not have to move under any circumstances, and the wide-area licensee must achieve contiguous spectrum, if it requires it, through other means. Voluntary relocation also will avoid the cumbersome process of identifying and creating a "Relocation Block," as proposed by SMR Won,^{33/} which would only further delay and complicate wide-area 800 MHz licensing. Similarly, under a voluntary scheme, few Commission resources will have to be devoted to mediating disputes over what constitutes a "fully comparable" channel for purposes of relocation. In any event, voluntary negotiations are more likely to yield a satisfactory determination of what is "fully comparable"; as the comments reflect, the industry is unlikely to agree at this time on such a definition.^{34/} Finally, Chadmoore and SMR Won argue that mandatory relocation amounts to an unconstitutional taking of property interests without adequate

^{32/} See, e.g., Comments of Ericsson at 6-7; SMR Won at 38-46; T & K Communications at 2.

^{33/} Comments of SMR Won at 49.

^{34/} See, e.g., Comments of Pro Tec at 4-6; Total Com at 8; SMR Won at 51-54. In no event, however, should a wide-area licensee be able to relocate incumbent systems in piecemeal fashion. Thus, relocation spectrum should not be deemed "fully comparable" unless all of the incumbent's channels are capable of being relocated simultaneously.

compensation.^{35/} If relocation is voluntary, however, the parties will decide the value of the incumbent spectrum and determine the incentives to move.^{36/}

V. Conclusion

18. The arguments in support of mandatory relocation are not sufficient to compel a change in the Commission's determination in the Further NPRM that voluntary relocation best serves the public interest. The principle of regulatory parity for CMRS, while supporting the authorization of SMR service on a geographic basis, does not provide a basis for mandating relocation of incumbents in order to obtain contiguous spectrum; rather, it supports making available the opportunity to obtain contiguous spectrum, and incenting the wide-area licensee to deal fairly with incumbents to obtain contiguous spectrum if the wide-area licensee has a compelling need for it. Consequently, the Commission should adopt wide-area SMR licensing rules that are based on voluntary relocation principles as set forth herein.

^{35/} See Comments Chadmoore at 24-25; SMR Won at 39-40.

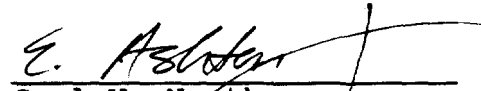
^{36/} Indeed, SMR Won appears to reach the same conclusion. Comments of SMR Won at 41.

WHEREFORE, CellCall respectfully requests that the Commission adopt rules in this proceeding consistent with the Comments and Reply Comments submitted by CellCall in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sondra R. Rich, a secretary with the law firm of Bryan Cave, hereby certify that a copy of the foregoing Reply Comments of CellCall, Inc. were mailed first class, postage prepaid, this 1st day of March, 1995, to the following:

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